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88-1333

Supreme Court, U.S.
FILED
FEB 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

NANCY ROBINSON,

Petitioner

PETITION FOR A WRIT OF CERTIORARI

Appeal Sought From The Order Of The Supreme Court Of Pennsylvania Dated November 29, 1988 Denying Petitioner's Petition For Allowance Of Appeal Dated August 24, 1988.

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QUESTIONS FOR REVIEW

1. Did the Commonwealth of Pennsylvania violate the due process clause by failing to consider Petitioner's claim that the District Attorney's closing argument unfairly shifted the burden to her to explain her actions? Defense counsel promptly objected. The trial judge promised curative instructions, but never gave them. The Superior Court of Pennsylvania held that defense counsel had waived this issue because he did not further object at the conclusion of the trial court's jury instructions. The Supreme Court of Pennsylvania denied Petitioner's Petition For Allowance of Appeal.

2. Did the Commonwealth of Pennsylvania violate the due process clause by refusing to review the sufficiency of the evidence arguments? Defense counsel filed some forty-five specific post-verdict motions. Two of those argued that the verdict was contrary to the evidence and contrary to the weight of the evidence. The Superior Court held that this language was not sufficient to preserve the issue of sufficiency of evidence for appellate review, and refused to consider it. The Supreme Court of Pennsylvania denied Petitioner's Petition For Allowance of Appeal.

3. Did the Commonwealth of Pennsylvania violate the due process clause by holding that after-discovered evidence could have been discovered by due diligence and by refusing an evidentiary hearing on the issue? The evidence was discovered six months after trial in Christmas decorations. The lower court held that it should have been discovered before trial by due diligence. The Superior Court upheld the lower court without further comment. The Supreme Court of Pennsylvania denied Petitioner's Petition For Allowance of Appeal.

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PETITION FOR A WRIT OF CERTIORARI

Appeal Sought From The Order Of The Supreme Court Of Pennsylvania Dated November 29, 1988 Denying Petitioner's Petition For Allowance Of Appeal Dated August 24, 1988.

REFERENCE TO OFFICIAL REPORTS

Essential to a consideration of this case is the opinion of the Superior Court of Pennsylvania dated June 3, 1988, the Superior Court order denying reargument, and the order of the Supreme Court of Pennsylvania denying the Petition For Allowance of Appeal. All of those documents are attached as exhibits.

JURISDICTIONAL GROUNDS

The order appealed from is the order of the Supreme Court of Pennsylvania dated November 29, 1988 denying the Petitioner's Petition For Allowance of Appeal. The Superior Court of Pennsylvania, on August 5, 1988 denied Petitioner's application for reargument. The Superior Court panel, in an opinion filed June 3, 1988,

refused to consider Petitioner's arguments regarding the District Attorney's closing argument and the sufficiency of evidence, holding that both had been waived. The Superior Court simply adopted the lower court's opinion regarding the availability of after-discovered evidence.

Jurisdiction of this Court is found in 28 U.S.C.S. §1257. The Supreme Court of Pennsylvania's refusal to allow this appeal, in a case in which the Superior Court declined to consider Petitioner's argument that her constitutional rights to due process and equal protection of the law were abridged has been recognized as a grounds for this Court's jurisdiction. *AKE v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

CONSTITUTIONAL PROVISIONS

Petitioner contends that the failure of the Pennsylvania appellate courts to consider her claims that the burden of proof was unfairly shifted upon her and that the evidence was not sufficient to support her conviction, coupled with the refusal of those courts to consider the after-discovered evidence, deprived her of life, liberty and property without due process of law and denied her the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was found guilty of third degree murder and sentenced to five years in prison by the trial judge who cogently noted at her sentencing, "There are many things we don't know about the occurrence in the Robinson home and I don't know if we ever will know". The victim was Petitioner's husband of eleven years. He was beaten and shot five times in the family kitchen sometime during the early morning hours of September 28, 1985. His wife and seventeen year old daughter were asleep upstairs. They testified that they had heard a

disturbance, but that it was not at all unusual for the victim to roam about the house banging inanimate objects.

No testimony was offered of any singular event of discord that surfaced between the Petitioner and her husband on this particular evening. There was no evidence of prior violence or threatened violence between them. There was, indeed, evidence that the victim frequently passed out and awoke and became ill and struck out at any object in his presence. His wife and stepdaughter had learned to avoid him during these periods. Seventeen witnesses testified for the Commonwealth and twenty-four for the Defendant. None of them witnessed the event and none essentially contradicted testimony given by other witnesses. The Commonwealth's main theory was that the Petitioner must have seen or heard other events on that night and was lying in her testimony. Her testimony, however, was completely corroborated by her daughter who was not charged or implicated in this crime.

During closing argument to the jury, the District Attorney said, "I submit to you, ladies and gentlemen, that Mrs. Robinson has something to explain here, and her explanation leaves much to be desired." Defense counsel immediately objected, and the court replied, "But she did take the stand and explain". Defense counsel further noted, "That doesn't place any burden on her to prove anything". The court, then in obvious agreement with defense counsel stated, "I will tell the jury that". This exchange took place during closing arguments. The trial court in its charge never alluded in any way to the District Attorney's improper argument and never did give the curative instructions that it had promised.

The Superior Court held that in spite of defense counsel's timely objection when the remark was made, his later failure to except to the court's charge or to request an additional specific curative instruction

waived this issue for appellate purposes and that it would not consider the Petitioner's contention that these remarks had unconstitutionally shifted a burden of proof upon her. As noted above, the Supreme Court of Pennsylvania declined to hear the appeal.

Following a guilty verdict, defense counsel filed forty-five specific reasons why post-verdict relief should have been granted. Two of those reasons stated specifically that the verdict was contrary to the evidence and the verdict was contrary to the weight of the evidence. Despite the fact that the appellate courts of Pennsylvania had been wrestling with the problem of how post-verdict motions should be properly phrased and filed, the Superior Court refused to consider whether or not the evidence was sufficient to support the conviction, stating that counsel had raised this issue in only a prohibited "boiler plate" fashion.

Six months after the trial ended, Petitioner was packing her belongings to leave the marital home and found, among Christmas decorations, two letters written by the decedent very close to the time of his death. These letters indicated quite clearly that he was planning to take his own life and would seek to have the blame placed upon the Petitioner. The lower court refused to consider the letters, refused to permit an evidentiary hearing concerning the manner of their discovery, and held only that the Petitioner had not exercised due diligence in uncovering the letters prior to the trial. The Superior Court adopted the lower court finding with no further comment.

ARGUMENT

In his closing argument to the jury, the District Attorney said, "I submit to you, ladies and gentlemen, that Mrs. Robinson has something to explain here, and her explanation leaves much to be desired." Defense counsel of course had no further opportunity to address

the jury, but made a timely objection to the Court. The trial court promised that it would give curative instructions to the jury, but never did so. The Superior Court of Pennsylvania, which was the only appellate court to review Petitioner's conviction, refused to consider this issue because it found that defense counsel had not specifically excepted and had failed to request additional specific instructions.

The Superior Court's decision was based upon its reading of the Pennsylvania Supreme Court's holding in *Dilliplaine v. Lehigh Trust Company*, 457 Pa. 255, 322 A.2d 114 (1974). In *Dilliplaine* the Court held that where trial counsel had neither offered a point for charge nor taken specific exception to the instructions given to the jury, he could not preserve the issue for appeal. However, the holding in *Dilliplaine* is completely inapposite to the present case. Here counsel clearly made the objection, and then relied upon the Court to give the promised curative instruction. This is not a situation where the Court did not know what instruction counsel wanted; the Court itself had promised the instruction. To hold that counsel should have taken an exception under these circumstances is to blindly raise form over substance.

The remarks of the District Attorney which went uncorrected into the jury room obviously violated the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt. As such the proceeding was unconstitutional. *Sandstrone v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Moreover, a serious question still exists as to whether any form of curative instruction could have corrected the error. Even if curative instructions had been given by the trial court, defense counsel would still have had not only the right but the obligation to argue upon appeal that serious

constitutional error had been committed and that appellate relief should therefore be granted. The appellate courts of Pennsylvania completely dismissed this argument.

No authority exists anywhere in the law to support the proposition that counsel must bring something to the court's attention more than once, especially where the court has noted the objection and promised a curative instruction. By refusing to even consider this issue, the Superior Court of Pennsylvania deprived the Petitioner of equal protection and refused to remedy a serious violation of due process. The Supreme Court of Pennsylvania, by declining to entertain the appeal, has left the Petitioner stymied by a highly technical procedural ruling from which she cannot now appeal. Under such circumstances, the Petitioner is entitled to ask the Supreme Court to review that ruling. *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554 (Seventh Circuit 1986).

In spite of the fact the defense counsel filed extensive motions for a new trial, the appellate court refused to consider the issue of whether or not the evidence was sufficient to sustain the conviction because it stated that the motions were filed in "boiler plate fashion". This phrase is used to describe a long-standing tradition in Pennsylvania of filing post-verdict motions which state only that the verdict is contrary to the evidence, the verdict is contrary to the weight of the evidence, and the verdict is contrary to the law.

In 1979, in *Commonwealth v. Gravely*, 486 Pa. 194, 404 A.2d 1296 (1979), the Supreme Court of Pennsylvania ruled that post-verdict motions which specify no more than the traditional "boiler plate" phrases will not preserve issues for appeal. In spite of that proscription, the appellate courts of Pennsylvania continued to entertain arguments raised regarding the sufficiency of evidence throughout later years. As late as 1983, the President Judge of the Superior Court of Pennsylvania,

in an opinion that reviewed the attempt to bar consideration on appeal of issues not raised in properly filed post-verdict motions, still entertained and ruled upon the issue of sufficiency of the evidence in spite of the fact that the post-verdict motions contained no more than the traditional "boiler plate" allegations. *Commonwealth v. Cardona*, 463 A.2d 11 (Pa. Super 1983). The inconsistently recognized procedural bar which was applied by the appellate court in this case does not establish an adequate and independent state ground to support the decision. *Johnson v. Mississippi*, 108 S.Ct. 1981 (1988).

In the present case, moreover, the post-verdict motions were not "boiler plate" as that term has been understood in the cases. While they contained some language that had been used in "boiler plate" motions of the past, they also contained some forty other additional reasons specifically directed to the proceedings in this case. While the sufficiency issue was avoided by the Superior Court on these procedural grounds, even the trial judge noted that the evidence introduced before him did not convince him that he would ever know what went on in that house on the date of the killing. The appellate court's refusal to consider the sufficiency issue was, itself, a lack of due process and deprived the Petitioner of equal protection under the law.

Six months after the trial, while packing belongings to leave her marital home of many years, the Petitioner found two letters in a box of Christmas decorations. Obviously they had been secreted there by the decedent. The significance of the letters was that they showed the decedent's deep hatred for the Petitioner and alluded to an ill-defined plan to cause his own death and have her blamed. The existence of the letters casts severe doubt upon the sufficiency of evidence to sustain the conviction. Their discovery certainly demanded that the Petitioner be given an opportunity to use them in some manner in her defense. They were not in any way

cumulative, and were not directed toward the credibility of any witness that testified. They were, by any standard of consideration, substantial evidence which certainly would have been admitted in the trial had their existence been known.

The trial court reviewed the after-discovered letters and a brief explanation supplied by a letter of defense counsel transmitting them and summarily concluded that in some unspecified way the Petitioner could have discovered them had she exercised due diligence before trial. The Petitioner, however, was on trial for her life. She produced 24 witnesses who testified to various events. The preparation of her defense obviously required her full time over many months. To impose upon her by hindsight an obligation to search through her Christmas decorations looking for exculpatory material of any kind is totally unrealistic. The court's decision to proceed in this fashion without even allowing the Petitioner the benefit of an evidentiary hearing certainly deprived her of due process. An evidentiary hearing under these circumstances is the least that due process requires.

It is respectfully submitted that the errors complained of above are serious, recurring errors of constitutional magnitude, and that if they are left unaddressed by this Court they will deprive the Petitioner of her rights to due process and equal protection under the law.

Respectfully Submitted,

F. Emmett Fitzpatrick

F. Emmett Fitzpatrick

Harold N. Fitzkee, Jr.

Harold N. Fitzkee, Jr.

APPENDIX

COMMONWEALTH OF PENNSYLVANIA	:	
	:	IN THE SUPERIOR COURT OF
v.	:	PENNSYLVANIA
	:	Harrisburg Office
NANCY ROBINSON,	:	
	:	No. 00248 Harrisburg, 1987
Appellant	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, York County, Criminal Division, at No. 2108 CA 1985.

BEFORE: BROSKY, MONTEMURO and JOHNSON, JJ.

MEMORANDUM: FILED: JUNE 3, 1988

This is an appeal from the judgment of sentence entered pursuant to appellant's conviction, by a jury, of third degree murder.

Appellant raised the following issues for our consideration: (1) whether the trial court failed to give required curative instructions to the jury; (2) whether the trial court improperly removed voluntary manslaughter from the jury; (3) whether after-discovered evidence required a new trial; (4) whether the trial court erred in admitting appellant's blouse into evidence; (5) whether the trial court erred in admitting evidence regarding life insurance policies; and (6) whether the evidence was insufficient to support the verdict.

Upon consideration of the trial court opinion and briefs by counsel, we affirm the judgment of sentence.

Appellant first claims that the trial court erred in its charge to the jury by failing to give curative instructions following remarks made by the District Attorney in his closing argument. We find this issue to be waived. Upon inspection of the record and transcript it would appear that no exception was granted nor was an objection to the instruction raised by appellant. Under *Dilliplaine v.*

Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974), a timely specific objection must be made at trial in order to preserve the issue for appellate review. In the absence of such an objection, we will not consider this allegation of error.

Appellant next argues that the trial court improperly removed from the jury the consideration of voluntary manslaughter. Appellant bases her claim on the following language of the trial court:

> I don't know of any evidence in this case or any testimony that would lead you to the belief that the Defendant, if she committed the killing, unreasonably believed that justifying circumstances were present, nor do I know of any specific testimony as to provocation on the part of the victim which would have excited or caused in a reasonable person an intense passion of the kind that would be required to reduce an otherwise unjustified and unlawful killing from Murder to Voluntary Manslaughter. (N.T. 852 (a) - 853 (a)).

Appellant, however, neglects to point out the trial court's next statement which read:

> But you may consider all of the testimony; and if you find that there were circumstances that would have justified the killing but that the Defendant, if she committed the killing, unjustifiably and unreasonably believed in those circumstances, or if your were satisfied beyond a reasonable doubt that she did commit the killing but did so in the heat of passion, then you may find her guilty of Voluntary Manslaughter. (N.T. 853 (a)).

Further, when instructing the jury on its function, the trial court stated:

> It is not for me to determine what the true facts of the case are. It is for you and you alone, and no one else can intrude upon that function. You must not

take anything from what I say or the manner in which I say it that I have any opinion as to what your verdict ought to be. I can assure you that any thoughts you may have concerning an opinion which you think I have is totally irrelevant because it is for you and you alone to render a verdict after determining the facts and applying the law as I give that law to you. (N.T. 833 (a)).

A judge is permitted to indicate to a jury his opinion with regard to the sufficiency of the evidence where: (1) the judge informs the jury of its power to return a verdict of Voluntary Manslaughter; and (2) the judge instructs the jury that they are the sole finders of fact. *Commonwealth v. Bennett*, 471 Pa. 419, 370 A.2d 373 (1977); *Commonwealth v. Gaddy*, 468 Pa. 303, 362 A.2d 217 (1976).

Also, we must look at the trial judge's charge in its entirety before making a determination as to any error. *Gaddy*, supra, *Dunlap v. Larkin*, 342 Pa. Super. 594, 493 A.2d 750 (1985). Looking at the trial court's charge in its entirety, we conclude that the consideration of Voluntary Manslaughter was not removed from the province of the jury.

Appellant's third, fourth and fifth assignments of error were properly and adequately disposed of by the trial court. Thus, we will not discuss them further.

Turning to the question of sufficiency of the evidence, we find said issue to be waived. Appellant's issue was presented in her Post-Verdict motions in boilerplate fashion. Our court has consistently held this to be insufficient to preserve the issue for review. *Commonwealth v. Holmes*, 315 Pa. Super. 256, 461 A.2d 1268 (1983); *Commonwealth v. Cieri*, 346 Pa. Super. 77, 499 A.2d 317 (1985); *Commonwealth v. Dougherty*, ____ Pa. Super. ____, 506 A.2d 936 (1986). Thus, that issue is waived.

Judgment of sentence affirmed.

DATED; JUNE 3, 1988
JUDGMENT ENTERED

MILDRED E. WILLIAMSON
DEPUTY PROTHONOTARY

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
NANCY ROBINSON,	:	
Appellant	:	No. 248 Harrisburg, 1987

ORDER

The court hereby DENIES appellant's petition for reargument of the decision dated June 3, 1988.

PER CURIAM

Date: August 5, 1988

A TRUE AND CORRECT COPY
ATTEST: 08/08/88

Mildred E. Williamson
DEPUTY PROTHONOTARY

Supreme Court of Pennsylvania
Middle District

MILDRED E. WILLIAMSON
DEPUTY PROTHONOTARY

434 Main Capitol Building
P.O. Box 624
Harrisburg, Pennsylvania 17108
(717) 787-8181

December 1, 1988

F. Emmett Fitzpatrick, Esquire
Suite 926 Public Ledger Bldg.
Philadelphia, PA 19106

Re: Commonwealth v. Nancy Robinson, Petitioner
No. 216 M. D. Allo. Dk., 1988

Dear Mr. Fitzpatrick:

This is to advise that the following Order has been entered for the above-captioned matter:

ORDER

"November 29, 1988
Petition Denied
Per Curiam."

Very truly yours,
Shirley Bailey
Chief Clerk

spb
CC: H. Stanley Rebert, Esq.
President Judge — York Co.
(2108 C.A. 1985)